MMI INDUSTRIES SDN BHD

v.

LET SIN INDUSTRIES SDN BHD

COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI JCA
ABDUL MALIK ISHAK JCA
KN SEGARA JCA
[CIVIL APPEAL NO: J-02-1146-2008]
26 AUGUST 2009

CONTRACT: *Specific performance - Sale and purchase of property - Conditions precedent to granting of specific performance - Whether plaintiff ready and willing to perform contract - Application for summary judgment - Order 81 r. 2, Rules of the High Court 1980*

CONTRACT: *Sale and purchase agreement - Application for specific performance - Application for summary judgment - Whether triable issues shown - Undisputed issue cannot constitute triable issue - Undisputed facts or questions of law can be determined summarily - No bona fide defence shown - Specific performance granted - Order 81 r. 2, Rules of the High Court 1980*

The defendant was the registered owner of a piece of land ('the said land'). The plaintiff rented the said land and operated a factory on it. The perimeter fencing to demarcate the boundary of the said land laid by the defendant encroached into the neighbouring land belonging to Textile Corporation (M) Sdn Bhd ('Textile'). The plaintiff signed a sale and purchase agreement ('SPA') with the defendant to purchase the said land from the defendant. The completion date for the SPA was 25 August 2006. However, on 14 June 2006, the plaintiff received a letter from the solicitors for Textile on the encroachment issue. On 22 June 2006, the plaintiff was ready and willing to complete the SPA but was prevented from doing so because of the encroachment issue. The encroachment issue was only resolved by the defendant in October 2007. The plaintiff's solicitors then drafted a supplemental agreement on 19 October 2007 which included terms requiring the Defendant to apply for and obtain fresh State Authority's consent and redemption cum undertaking. The earlier consent and redemption obtained by the defendant had lapsed. However, the

defendant's solicitors proposed that the SPA should be terminated and a fresh agreement be executed reflecting the sale price at RM5.9 million and all other payments made by the plaintiff up to that date be deemed rent save that the 10% deposit of the purchase price be deemed paid. The proposals ran counter to the defendant's earlier request that the plaintiff continue to pay rent pending the resolution of the encroachment issue and that the rent paid would be treated as part payment of the balance of the purchase price. The defendant also wanted the plaintiff to continue paying rent until completion of the proposed new agreement. The plaintiff rejected the defendant's proposals. The plaintiff's solicitors then purported to terminate the SPA on the ground that the plaintiff had failed to pay the balance of the purchase price on or before the extended completion date of 25 September 2007. The plaintiff filed an action in the High Court for specific performance. The plaintiff also filed a summary judgment application under O. 81 of the Rules of the High Court 1980 for specific performance of the SPA (encl. 9). The High Court dismissed encl. 9 and the plaintiff appealed against this decision.

Held (allowing the appeal with costs)
Per Abdul Malik Ishak JCA:

(1) The party seeking specific performance must show to the satisfaction of the court that he is ready and willing to perform the contract. The plaintiff had discharged its onus of proving readiness and willingness to perform its part of the bargain under the SPA continuously from the date the SPA was executed till the date of the disposal of encl. 9. (paras 11 & 22)

(2) The lapse of the State Authority consent was not disputed. What is not disputed can never constitute a triable issue. The effect of the lapse of the consent on the plaintiff's failure to pay the balance of the purchase price was not an issue that required a trial. It was more in the nature of a question of law. (para 39)

(3) The encroachment by the defendant onto Textile's land was a clear breach of the condition of the SPA. As an innocent party, the plaintiff was thus relieved from performing its obligations under the SPA until the defendant had remedied

the breach by settling the encroachment issue with Textile. Thus, the failure of the plaintiff to pay the balance of the purchase price before the completion date did not constitute a triable issue. The High Court had erred when it held otherwise. (para 41)

(4) Pending the resolution of the encroachment issue, the defendant requested the plaintiff to continue to pay the rent. Both the parties agreed that all these payments would be treated as part payment of the purchase price of the said land as the parties continue to complete the SPA after the resolution of the encroachment issue. (para 42)

(5) The defendant did not dispute the fact that it had encroached into Textile's land. There was no need for a trial concerning the question of encroachment. (para 56)

Per KN Segara JCA:

(1) The respondent was attempting to take undue advantage to enrich itself as a result of the lapse of the State Authority Approval that had come about entirely as a result of the encroachment issue. The circumstances of the case did not warrant the termination of the SPA but merely the execution of a suitably drafted supplemental agreement to give force and effect to the original SPA. (para 81)

(2) This was a proper case for summary judgment. It was abundantly clear that the issues identified by the learned judge as triable were not issues that required a trial, as the issues in fact involved either undisputed facts or concerned questions of law that could be determined summarily. The respondent has not raised any *bona fide* defence to the appellant's claim for specific performance of the SPA. (para 101)

Bahasa Malaysia *Translation Of Headnotes*

Defendan merupakan pemilik berdaftar sebidang tanah ('tanah tersebut'). Plaintif sewa tanah tersebut dan mengendalikan sebuah kilang di atasnya. Perimeter pagar untuk menandakan sempadan tanah tersebut oleh defendan mencerobohi ke dalam tanah bersebelahan yang dimiliki oleh Textile Corporation (M) Sdn Bhd ('Textile'). Plaintif menandatangani suatu perjanjian jual beli ('PJB')

dengan defendan untuk membeli tanah tersebut daripada defendan. Tarikh penyempurnaan PJB ialah 25 Ogos 2006. Walau bagaimanapun, pada 14 Jun 2006, plaintif telah menerima satu surat daripada peguamcara Textile berkenaan dengan isu pencerobohan itu. Pada 22 Jun 2006, plaintif sudah sedia dan ingin menyempurnakan PJB tetapi dihalang dari berbuat demikian disebabkan isu pencerobohan. Isu pencerobohan hanya telah diselesaikan oleh defendan pada Oktober 2007. Peguamcara plaintif telah mendraf satu perjanjian tambahan pada 19 Oktober 2007 yang mengandungi terma-terma yang memerlukan defendan untuk memohon dan memperolehi keizinan dan penebusan dan akujanji baru Pihak Berkuasa Negeri. Keizinan dan penebusan dahulu yang diperolehi oleh defendan telah luput. Walau bagaimanapun, peguamcara defendan mencadangkan bahawa PJB sepatutnya ditamatkan dan suatu perjanjian baru dilaksanakan yang menunjukkan harga jualan pada RM5.9 juta dan semua bayaran-bayaran lain yang dibuat oleh plaintif sehingga tarikh itu dianggap sewa kecuali deposit 10% harga belian dianggap telah dibayar. Cadangan itu bertentangan dengan permintaan dahulu defendan bahawa plaintif terus membayar sewa sementara menunggu penyelesaian isu pencerobohan itu dan sewa yang dibayar akan dianggap sebagai bayaran berbahagian baki harga belian. Defendan juga hendak plaintif terus membayar sewa sehingga penyempurnaan perjanjian baru yang dicadangkan. Plaintif menolak cadangan defendan. Peguamcara plaintif kemudian cuba menamatkan PJB atas alasan bahawa plaintif telah gagal membayar baki harga belian pada atau sebelum tarikh penyempurnaan lanjutan 25 September 2007. Plaintif memfail suatu tindakan di Mahkamah Tinggi untuk pelaksanaan spesifik. Plaintif juga memfail sesuatu permohonan penghakiman terus di bawah A. 81 Kaedah-kaedah Mahkamah Tinggi 1980 untuk pelaksanaan spesifik PJB (lampiran 9). Mahkamah Tinggi menolak lampiran 9 dan plaintif merayu terhadap keputusan itu.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Abdul Malik Ishak HMR:

(1) Pihak yang menuntut pelaksanaan spesifik mesti memuaskan mahkamah bahawa beliau sedia dan ingin melaksanakan kontrak itu. Plaintif telah melepaskan onus membuktikan kesediaan dan keeinginan untuk melaksanakan bahagiannya di bawah PJB secara berterusan dari tarikh PJB disempurnakan sehingga tarikh penyelesaian lampiran 9.

(2) Keluputan keizinan Pihak Berkuasa Negeri tidak dipertikai. Apa yang tidak dipertikai tidak boleh menjadi suatu isu yang perlu dibicara. Kesan keluputan keizinan berhubung dengan kegagalan plaintif untuk membayar baki harga belian bukan satu isu yang memerlukan suatu perbicaraan. Ia lebih bersifat kepada satu soalan undang-undang.

(3) Pencerobohan oleh defendan pada tanah Textile merupakan suatu pelanggaran jelas syarat PJB. Sebagai pihak yang tidak bersalah, plaintif oleh itu tidak perlu memenuhi obligasinya di bawah PJB sehingga defendan membetulkan pelanggaran itu dengan menyelesaikan isu pencerobohan dengan Textile. Oleh yang demikian, kegagalan plaintif untuk membayar baki harga belian sebelum tarikh penyempurnaan tidak merupakan suatu isu yang perlu dibicara. Mahkamah Tinggi telah khilaf apabila memutuskan sebaliknya.

(4) Sementara menunggu penyelesaian isu pencerobohan itu, defendan telah meminta plaintif untuk terus membayar sewa. Kedua-dua pihak setuju bahawa semua bayaran-bayaran ini akan dianggap sebagai bayaran berbahagian harga belian tanah tersebut kerana pihak-pihak terus menyempurnakan PJB selepas penyelesaian isu pencerobohan.

(5) Defendan tidak mempertikaikan fakta bahawa ia telah menceroboh dalam tanah Textile. Tidak ada keperluan bagi sesuatu perbicaraan mengenai soalan pencerobohan.

Oleh KN Segara HMR:

(1) Responden cuba mengambil kesempatan yang tak berpatutan disebabkan keluputan keizinan Pihak Berkuasa Negeri yang telah terjadi disebabkan isu pencerobohan. Keadaan kes tidak mewajarkan penamatan PJB tetapi hanya penyempurnaan suatu perjanjian tambahan yang telah didraf dengan betul untuk memberi kuasa dan efek kepada PJB yang asal.

(2) Ini adalah kes yang berpatutan bagi penghakiman terus. Ia sungguh jelas bahawa isu-isu yang dikenalpasti oleh yang arif hakim sebagai yang perlu dibicara sebenarnya bukan isu-isu yang memerlukan suatu perbicaraan, oleh kerana isu-isu sebenarnya melibatkan fakta-fakta yang tidak dipertikaikan atau berkenaan dengan soalan-soalan undang-undang yang boleh

ditentukan terus. Responden tidak membangkitkan apa-apa pembelaan *bona fide* terhadap tuntutan perayu untuk pelaksanaan spesifik PJB.

Case(s) referred to:

Ajit Prashad Jain v. NK Widhani and Others AIR [1990] Delhi 42 ***(refd)***

Anjali Das v. Bidyut Sarkar AIR [1992] Cal 47 ***(refd)***

Bentworth Finance Ltd v. Lubert And Another [1968] 1 QB 680 ***(refd)***

Brown and Others v. Knowsley Borough Council [1986] IRLR 102 ***(refd)***

Caesar Lamare v. Thomas Dixon [1873] 6 LRHL 414 ***(refd)***

Chappell And Others v. Times Newspapers Ltd And Others [1975] 1 WLR 482 CA ***(refd)***

Chin Tai v. Siow Shiow & Ors [1971] 1 MLJ 67 ***(refd)***

Chong Hoong & Anor v. Wong Yuen Sang [1976] 1 MLJ 282 ***(refd)***

Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd [1997] 3 All ER 297 ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2007] 6 CLJ 741 CA ***(refd)***

Edwards v. Marcus [1894] 1 QB 587 ***(refd)***

Ganam Rajamany v. Somoo Sinniah [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123 FC ***(refd)***

Gyllenhammar & Partners International Ltd And Others v. Sour Brodogradevna Industrija [1989] 2 Lloyd's Rep 403 ***(refd)***

Harvela Investments Ltd v. Royal Trust Company of Canada (C.I.) Ltd And Others [1986] AC 207 ***(refd)***

Hassan v. Ismail [1970] 1 MLJ 210 ***(refd)***

Jameson and another (executors of Jameson (decd)) v. Central Electricity Generating Board (Babcock Energy Ltd, third party) [1999] 1 All ER 193 ***(refd)***

John Pym v. Robert James Roy Campbell, James Thompson Mackenzie And Richard Pastor Pritchard [1856] 6 EI & BI 379 ***(refd)***

KM Jose and Others v. D Anantha Bhat AIR [1987] Kant 173 ***(refd)***

Lazard Brothers & Co Ltd v. Fairfield Properties Co (Mayfair) Ltd [1977] 121 SJ 793 ***(refd)***

Loo Choo Teng & Anor v. Cheok Swee Lee & Ors and Another Appeal [2000] 2 CLJ 389 CA ***(refd)***

Manks v. Whiteley [1912] 1 Ch 735 ***(refd)***

Marks v. Board And Another [1930] 46 TLR 424 ***(refd)***

Mawar Awal (M) Sdn Bhd v. Kepong Management Sdn Bhd & Anor [2005] 7 CLJ 296 HC ***(refd)***

Milward v. Earl of Thanet [1801] 5 Ves. Jun 719 ***(refd)***

Mrs Chandnee Widya Vati Madden v. Dr CL Katial and Others AIR [1964] SC 978 ***(refd)***

Mukesh v. Deonarayan and Others AIR [1987] MP 85 ***(refd)***

National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(refd)***

Pakharsingh v. Kishansingh AIR [1974] Raj 112 ***(refd)***

Pasumarti Ramulu v. Nuthi Anantha Ramulu AIR [1966] AP 70 ***(refd)***
Sau, Shantabai v. Manakchand Ratanchand Raka AIR [1988] Bom. 82 ***(refd)***
Shah Jitendra Nanalal, Ahmedabad v. Patel Lallubhai Ishverbhai, Ahmedabad and Others AIR [1984] Guj 145 ***(refd)***
Smith v. Chadwick [1881-2] 20 Ch D 27 ***(refd)***
Syed Jalal and Others v. Targopal Ram Reddy and Others AIR [1970] AP 19
Turner v. Bladin And Others [1951] 82 CLR 463 ***(refd)***
Wiedeman v. Walpole [1891] 2 QB 534 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 81 rr. 1(1), (2), 2(1), (2)
Specific Relief Act 1950, ss. 21(1), 23(b)

For the plaintiff/appellant - Dr Clarence Edwin (Mr Paramanandan with him); M/s Clarence Edwin Law Offices
For the defendant/respondent - Dr Wong Kim Fatt (Wong Boon Lee with him); M/s Gulam & Wong

[Appeal from High Court, Johor Bahru; Civil Suit No: MT4-22-224-2008]

Reported by Amutha Suppayah

JUDGMENT

Abdul Malik Ishak JCA:

[1] I shall refer to the parties like what they were referred to in the High Court. Thus, MMI Industries Sdn Bhd (224071-U) shall be referred to as the plaintiff while Let Sin Industries Sdn Bhd (58773-H) shall be referred to as the defendant.

The High Court Action

[2] The plaintiff filed an action in the High Court for specific performance of the sale and purchase agreement ("SPA") dated 8 February 2006 in respect of a piece of industrial land identified as HS(D) 181259 PTD 2571 Mukim of Pulai, District of Johor Bahru measuring approximately 1.214 hectares and having the postal address of Lot 2571, No: 4, Block A, B, C & D, Jalan Semangka, Kampong Sri Jaya, 81200 Johor Bahru ("the said land") and other ancillary orders.

[3] The prayers sought by the plaintiff in its statement of claim as reflected at pp. 65 to 67 of the appeal record (Jilid 1) ("ARJ1") were worded in this way:

30. AND the Plaintiff claims:

30.1 Specific performance of the SPA with an abatement of the balance purchase price in respect of the sum of RM1,591,000.00 paid by the Plaintiff to the Defendant as rent for the period of February 2006 until September 2007 and as deposit under the SPA;

30.2 Further or alternatively, damages for breach of contract;

30.3 All ancillary orders necessary for parties to complete the SPA and in particular an Order that:

a. The Defendant do within 7 days of the date of judgment submit the necessary application for State Authority Approval or renewal.

b. The Defendant do within 7 days of the date of judgment procure from the existing chargee a fresh Redemption cum Undertaking.

c. That in the event State Authority Approval is not obtained within 6 months, the SPA will be deemed terminated and the Defendant shall return to the Plaintiff within 7 days the sum of RM590000;

d. That upon State Authority Approval and the Redemption cum Undertaking being obtained (whichever is the later), the SPA shall be completed by payment of the sum of RM4,309,000.00 to the Defendant's solicitors by way of a bankers' draft within 30 days;

e. That the Defendant's solicitors be authorised to release to the existing chargee from the sum stated in paragraph 30.3(d) above the sum necessary to redeem the charge on the said Land and to secure a discharge of charge from the chargee;

f. That upon payment of the sum in paragraph 30.3(d) above, the Defendant shall execute and deliver to the Plaintiff's solicitors within 7 days a Memorandum of Transfer to the said Land in favour of the Plaintiff failing which the Registrar of the Court be authorised to execute the said Transfer in the Defendant's stead, together with the duly executed and stamped discharge of charge; and

g. Once the documents in paragraph 30.3(f) are released to the Plaintiff's solicitors, the Defendant's solicitors be authorised to release the balance of the purchase price in their hand (if any) to the Defendant.

30.4 Interest on any damages awarded at the rate of 8% per annum for such period as permitted by Section 11 of the Civil Law Act 1956.

30.5 Costs.

30.6 Any further or other relief as this Honourable Court deems fit.

[4] By way of a summons in chambers dated 8 May 2008, the plaintiff sought for an order pursuant to O. 81 of the Rules of the High Court 1980 ("RHC") for specific performance of the SPA together with costs to be borne by the defendant and paid to the plaintiff. The grounds to support the summons in chambers alleged that the defendant refused to perform its obligations under the SPA and that the defendant had no defence to the action together with the other grounds deposed to in the affidavit in support of Wong Sook Shyan. This summons in chambers was marked as encl. 9 and basically it was the plaintiff's summary judgment application under O. 81 of the RHC for specific performance of the SPA. On 4 September 2008, the High Court dismissed the plaintiff's application in encl. 9 and ordered that this matter proceed to trial. It is against this decision that the plaintiff now appeals to this court.

[5] Sadly, in the intervening period prior to the decision of the High Court on 4 September 2008, the defendant had threatened to evict the plaintiff from the said land. This prompted the plaintiff to file encl. 19 which was the plaintiff's application for an *interim* injunction to restrain the defendant from doing so. After hearing arguments, the High Court had on 4 September 2008 delivered its decision and allowed the plaintiff's application for an *interim* injunction pending disposal of the trial of the action.

The Procedure Under O. 81 Of The RHC

[6] Order 81 r. 1(1) of the RHC allows the plaintiff to obtain summary judgment in an action for specific performance of a contract for the sale and purchase of land without having to proceed to a full trial in a situation where there is no triable defence to the action. The plaintiff can apply straight away for summary judgment under O. 81 of the RHC without having to wait for the defendant to enter an appearance in the action (see r. 1(2)). The minutes of the judgment sought must be attached to

A the summons filed under cover of O. 81 of the RHC (see r. 2(2)). What is pertinent to note is that an application under O. 81 of the RHC must relate to the whole action and not to the particular part of the claim. And by virtue of r. 2(1) of O. 81 of the RHC, the affidavit in support must be deposed by "some person who
B can swear positively to the facts verifying the cause of action and stating that in his belief there is no defence to the action".

[7] While sitting in the High Court in the case of *Mawar Awal (M) Sdn Bhd v. Kepong Management Sdn Bhd & Anor* [2005] 7 CLJ
C 296, 305, I had occasion to ventilate my views about the procedural aspects of O. 81 of the RHC and this was what I said:

> [15] Order 81 of the RHC relates to the procedure for summary judgment and it applies to any action begun by writ indorsed with
D a claim. It has the same procedural objective as O. 14 of the RHC in that it provides for a speedy mechanism for obtaining summary judgment without proceeding to a trial. It is certainly effective in an action for specific performance for the sale and purchase of a piece of land where there is no defence to the
E action at all. It must be borne in mind that an application for summary judgment under O. 81 of the RHC may be filed notwithstanding the fact that the defendant has not entered an appearance (*Alloy Automative Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 and O. 81 r. 1(2) of the RHC). It is also ideal to note that an application under O. 81
F of the RHC must relate to the whole action at hand. Of course, the remedy for specific performance is enshrined in the Specific Relief Act 1950 and it is entirely discretionary (*Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd* [1989] 2 CLJ 155; [1989] 1 CLJ (Rep) 154 (SC); and *Yeong Ne Hong lwn. Bumida Engineering &*
G *Construction Sdn Bhd* [1995] 1 LNS 307) and it is also ideal to enforce an agreement, whether in writing or not, for the sale and purchase of a property as exemplified in *Bank of Tokyo Ltd v. Mohd Zaini bin Arshad (Maria Pragasam, Intervenor)* [1991] 2 CLJ 989; [1991] 2 CLJ (Rep) 341, *Chong Hoong & Anor v. Wong Yuen Sang* [1976] 1 MLJ 282; *Chan Kin & Anor v. Chareen Realty*
H *Development Sdn Bhd* [1989] 1 MLJ 62; and *Masalam Sdn Bhd v. Ngah bin Embong & Anor* [1998] 2 CLJ 817 (CA). Specific performance too is effective in ordering the delivery of strata title as seen in case of *Syed Azman bin Syed Mohamed v. Lian Seng (KL) Construction Co Sdn Bhd* [1992] 4 CLJ 2194; [1992] 3 CLJ
I (Rep) 625. It has often been said that an order for summary judgment under O. 81 of the RHC should only be made in a

plain case and where there is no necessity for a trial (*Bigg v. Boyd Gibbins Ltd* [1971] 2 All ER 183 at p 184, [1971] 1 WLR 913 at p 915 (CA)). Such a procedure is also ideal where the defence put forward is obviously 'frivolous and practically moonshine' (*Codd v. Delap* [1905] 92 LT 510 at p 511 (HL) per Lord Lindley). The court is empowered after hearing an O. 81 application to give judgment to the plaintiff (r. 3 of O. 81 of the RHC) unless the defendant succeeds in satisfying the court that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of the action (r. 3 of O. 81 of the RHC).

Specific Performance

[8] An order for specific performance has the effect of ordering a contracting party to do what he has undertaken to do. It is an equitable remedy. It cannot be asked for as of right. It is certainly a discretionary remedy but the discretion cannot be exercised arbitrarily or capriciously. The exercise of the discretion is always governed by fixed rules and principles (*Caesar Lamare v. Thomas Dixon* [1873] 6 LRHL 414, at p. 423).

[9] Certain factors affecting the court's discretion in granting specific performance may include the issue of delay when asking for the remedy (*Milward v. Earl of Thanet* [1801] 5 Ves. Jun. 719; and *Lazard Brothers & Co Ltd v. Fairfield Properties Co (Mayfair) Ltd* [1977] 121 SJ 793). Then the court may have to consider whether the person seeking specific performance is himself prepared to perform his side of the contract (*Chappell And Others v. Times Newspapers Ltd. And Others* [1975] 1 WLR 482, CA). Even a threatened refusal to perform a contract can, in appropriate cases, justify an order for specific performance (*Turner v. Bladin And Others* [1951] 82 CLR 463 at p. 472).

[10] I will now refer to the Specific Relief Act 1950 (Act 137) which is the statute governing specific performance in Malaysia. The Act is quite elaborate and s. 21(1) makes reference to the discretionary power of the court to grant specific performance (*Ganam Rajamany v. Somoo Sinniah* [1984] 2 CLJ 268; [1984] 1 CLJ (Rep) 123, FC; *Loo Choo Teng & Anor v. Cheok Swee Lee & Ors and Another Appeal* [2000] 2 CLJ 389, CA; and *Co-operative Insurance Society Ltd v. Argyll Stores (Holdings) Ltd* [1997] 3 All ER 297, HL).

[11] It is imperative that the party seeking specific performance must show to the satisfaction of the court that he is ever ready and willing to perform the contract. Seah FJ in *Ganam d/o Rajamany v. Somoo s/o Sinnah* spoke of the need of the plaintiff to be in a state of "continuous readiness and willingness, … to perform the contract". Section 23(b) of the Specific Relief Act 1950 (Act 137) bars specific performance of a contract in favour of a person who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed. Here, it will be demonstrated later that the plaintiff was in a continuous state of readiness to perform the SPA.

[12] There is no restriction for the court in granting an order for specific performance to impose such terms as are necesary. Indeed this was the approach adopted by this court in *Loo Choo Teng & Anor v. Cheok Swee Lan & Ors and Another Appeal (supra)*. It goes without saying that each case must be considered and judged on its own merits. In *Hassan v. Ismail* [1970] 1 MLJ 210, FC, for instance, the court ordered specific performance of an agreement for the sale of a piece of land subject to sub-division and, in so doing, the court required the vendor to submit an application for sub-division to the land office. Again in *Chin Tai v. Siow Shiow & Ors*. [1971] 1 MLJ 67, the Federal Court granted specific performance of the agreement of sale and directed the vendor to obtain the permission of the collector for the transfer of the land. And in *Harvela Investments Ltd. v. Royal Trust Company of Canada (C.I.) Ltd. And Others* [1986] AC 207, [1985] 2 All ER 966, the House of Lords ordered specific performance of a contract of sale of shares subject to the payment by the purchasers of interest for the delay, notwithstanding that the delay was caused by the vendors who were in breach of the contract.

The Undisputed Facts And The Analysis Thereto

[13] The defendant is the registered owner of the said land. In 1992, the plaintiff rented the said land and occupied it. Initially, the plaintiff merely rented a portion of the said land. Later, the plaintiff rented the whole portion of the said land. The last tenancy agreement between the parties was sometime on the 1st of April 2004 – an April fool's day. And the agreed monthly rental under this agreement was RM63,800.

[14] The plaintiff operates a factory on the said land and employed approximately 850 workers. A

[15] The defendant laid the perimeter fencing to demarcate the boundary of the said land. This perimeter fencing encroached into the neighbour's land and formed the basis of altercation between both parties as shown later. B

[16] The plaintiff was desirous of purchasing the said land and for this purpose the SPA between both parties dated 8 February 2006 was signed. The salient terms of the SPA were as follows: C

(a) the purchase price was listed at RM5.9 million;

(b) the sum of RM295,000 will be paid to the defendant by the plaintiff upon execution of the SPA;

(c) a further sum of RM295,000 to be paid to the plaintiff's solicitors as stakeholders which will be kept in an interest-bearing account and utilised in the manner as stated in para. (B)(4) of the Second Schedule to the SPA; and D

(d) the balance of the purchase price of RM5.31 million to be paid within three months from the date of compliance of all the conditions precedent as stated in the Second Schedule of the SPA. E

[17] It must be borne in mind and it is an undisputed fact that conditions (b) and (c) of para 16 above have been satisfied. F

[18] It would be appropriate to set out, briefly, the conditions precedent encapsulated in the Second Schedule of the SPA. I shall do so now: G

(i) there must be a confirmation by way of a letter from the defendant's financier addressed to the plaintiff's solicitors that the redemption sum for the said land on the latest date stipulated in the letter does not exceed 75% of the purchase price; H

(ii) a letter of undertaking from the defendant's financier to release to the defendant's solicitors upon receipt of the agreed redemption sum the issue document of title to the said land, the duplicate charge and the discharge of charge thereto duly I

executed and stamped must be sent and received by the plaintiff's solicitors (para (i) above and this paragraph are jointly referred to as "the redemption cum undertaking");

(iii) the defendant must obtain the approval and consent of the State Authority of Johor to transfer the said land to the plaintiff; and finally

(iv) the defendant must procure the removal of a caveat on the said land entered by Selatan Johor Electrical Engineering Sdn Bhd.

[19] All these conditions precedent in the Second Schedule of the SPA have been fulfilled and the completion date for the SPA was set on 25 August 2006. This was confirmed by the defendant's solicitors letter dated 26 May 2006 and in that letter the completion was stated to be on 25 August 2006 with a one (1) month extension that would expire on 25 September 2006. In short, the plaintiff had until 25 September 2006 to pay the balance of the purchase price to the defendant.

[20] All seems to go on smoothly as envisaged by the plaintiff. But, this was not to be. On 14 June 2006, the plaintiff received a letter from the solicitors representing Textile Corporation (M) Sdn Bhd ("Textile"), the owner of the land adjoining the defendant's said land, alleging that its land had been encroached by the defendant.

[21] The defendant was notified of the encroachment. The defendant informed the plaintiff that it was engaged in serious discussions with Textile to resolve the issue of encroachment amicably.

[22] On 22 June 2006, the plaintiff deposited the balance of the purchase price with its solicitors and was thus ready and willing to complete the SPA. This shows that the plaintiff could have completed the sale on that day but was prevented from doing so because of the defendant's encroachment on Textile's land. Without a doubt, the plaintiff has discharged its onus of proving readiness and willingness to perform its part of the bargain under the SPA continuously from the date the SPA was executed till the date of the disposals of encls. 9 and 19 (*Pakharsingh v. Kishansingh* AIR [1974] Raj 112). On the part of the plaintiff, it was a case of a continuous state of readiness and willingness to perform the SPA.

[23] Meantime, pending the resolution of the encroachment issue the defendant requested the plaintiff to pay rent notwithstanding the fact that under the terms of the SPA, the plaintiff was no longer required to pay rent with effect from 1 February 2006. Pending the completion of the SPA, it was an agreed term that the plaintiff would continue to occupy and enjoy vacant possession of the said land.

[24] Still interested in completing the SPA, the plaintiff agreed to the defendant's request to pay rent pending the resolution of the encroachment issue subject to one simple condition and that would be that the payments of the rentals would be treated as part payment of the purchase price of the said land. This simple condition was repeatedly stated in twelve (12) contemporaneous letters written by the plaintiff's solicitors to the defendant's solicitors. In one of those twelve (12) letters, the plaintiff's solicitors wrote (see the letter dated 8 November 2006 as seen at pp. 178 to 179 of "ARJ1") to this effect:

> we were informed by our client that parties have agreed to the following arrangements:
>
> (a) While parties are still in the process of resolving the encroachment issue, our client will utilise the following deposits amounting to RM486,400 to set off the rentals of the abovementioned property ... .
>
> (d) In the event that parties continue with and complete the sale and purchase agreement dated 8.2.2006, the abovementioned total sum of RM638,000.00 will be treated as part payment towards the balance of the purchase price free of interest.

[25] It is germane to mention that the other eleven (11) letters which the plaintiff's solicitors sent to the defendant's solicitors from November 2006 until October 2007 contained similar terms and were never refuted (see exhs. "P5" and "P6" of the plaintiff's affidavit in support at pp. 180-182 and 183 to 203 of "ARJ1").

[26] On the value of contemporaneous documents, Jessel MR had this to say in *Smith v. Chadwick* [1881-2] 20 Ch D 27 at pp. 62 to 63:

> ... when documents are actually contemporaneous, that is, two deeds executed at the same moment, ... or within so short an interval that having regard to the nature of the transaction the Court comes to the conclusion that the series of deeds represents

A a single transaction between the same parties, it is then that they are all treated as one deed; and, of course, one deed between the same parties may be read to show the meaning of a sentence, and be equally read, although not contained in one deed, but in several parchments, if all the parchments together in the view of the Court make up one document for this purpose.

B

[27] This is indeed a sound principle of law. Fletcher Moulton LJ in *Manks v. Whiteley* [1912] 1 Ch. 735, CA, at pp. 754 to 755 explained the rationale of this principle in erudite terms in this way:

C

> ... where several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one
>
> D transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole. It is not open to third parties to treat each one of them as a deed representing a separate and independent transaction for the purpose of claiming rights which would only accrue to them
>
> E if the transaction represented by the selected deed was operative separately. In other words, the principles of equity deal with the substance of things, which in such a case is the whole transaction, and not with unrealities such as the hypothetical operation of one of the deeds by itself without the others.

F **[28]** I would, consequently, give legal effect to all the twelve (12) contemporaneous letters in favour of the plaintiff. They should be read together with the SPA and be construed in favour of the plaintiff. In *Edwards v. Marcus* [1894] 1 QB 587, CA an individual applied for and was allotted profit sharing deposit notes in a

G respectable company. The application was entirely based on the contents of a written prospectus of the said company. The court held that the notes and the prospectus must be read together as constituting the contract between that individual and the said company.

H

[29] Reverting back to the facts of the case, it must be mentioned that the encroachment issue with Textile was resolved in October 2007 by the defendant. This prompted the plaintiff's solicitors to draft a supplemental agreement on 19 October 2007

I and it was duly sent to the defendant's solicitors for their perusal and comments. It cannot be denied that a supplemental agreement

was necessary because by the time the encroachment issue was resolved, the State Authority's approval and consent together with the redemption cum undertaking which had been earlier obtained by the defendant had lapsed. Standard terms were incorporated in the draft supplemental agreement to reflect the necessity to complete the whole transaction. And these would include a term requiring the defendant to make a fresh application for renewal of the State Authority's approval and consent which had since lapsed together with the requirement that the defendant was required to obtain a fresh redemption cum undertaking from their financier or existing chargee.

[30] The response from the defendant's solicitors came some three weeks later. It was on 7 November 2007. In that letter, the defendant's solicitors proposed that as the State Authority's approval and consent had lapsed, the SPA should be terminated and a deed of revocation executed. The defendant also proposed that a fresh agreement in respect of the sale of the said land be executed reflecting the sale price at RM5.9 million and all other payments made by the plaintiff up to that date be deemed rent save that the 10% deposit of the purchase price be deemed paid. The proposals certainly ran counter to the defendant's earlier request that the plaintiff continue to pay rent pending the resolution of the encroachment issue and that the rent paid would be treated as part payment of the balance of the purchase price. Incidentally, the defendant also wanted the plaintiff to continue paying rent until completion of the proposed new agreement.

[31] It came as no surprise when the plaintiff rejected the defendant's proposals. Through its solicitors the plaintiff insisted that parties complete the SPA subject to the necessary variations as set out in the draft supplemental agreement.

[32] The plaintiff through it solicitors, once again, forwarded the draft supplemental agreement to the defendant's solicitors. This was on 10 December 2007. The defendant's solicitors responded on the following day with a demand for the sum of RM1,467,400 being alleged rent for 23 months from February 2006 to December 2007.

[33] The plaintiff's solicitors responded to this demand and reiterated that the rent paid up to October 2007 was to be treated as payment of part of the purchase price as earlier agreed at defendant's own request. The plaintiff also insisted that the

defendant complete the SPA forthwith bearing in mind that the defendant had resolved the encroachment issue. By way of a letter dated 24 December 2007, the defendant's solicitors wrote a letter to the plaintiff's solicitors purportedly terminating the SPA on the ground that the plaintiff had failed to pay the balance of the purchase price on or before the extended completion date of 25 September 2007. The letter purporting to terminate the SPA was received by the plaintiff's solicitors on 26 December 2007. I have to emphasise that it is an undisputed fact as alluded to earlier that the plaintiff was ready, willing and able to pay the balance of the purchase price well within the completion period as stated in the SPA and the plaintiff had in fact deposited the balance of the purchase price with its solicitors. At that time, the balance of the purchase price was withheld pending the resolution of the encroachment issue by the defendant.

[34] The plaintiff disputed the termination of the SPA by the defendant and instructed its solicitors to file an action in the High Court for specific performance of the SPA and other ancillary orders. I have alluded about this in the early part of this judgment. The plaintiff also filed a summary judgment application under O. 81 of the RHC for specific performance of the SPA as reflected in encl. 9 as well as for an *interim* injunction as reflected in encl. 19. I too have stated this in the early part of this judgment.

[35] In dismissing the plaintiff's application for summary judgment, the High Court was of the view that the case was not suitable for summary disposal and that there were the following triable issues:

(i) The lapse of the State Authority's approval and its effect on the plaintiff's failure to pay the balance of the purchase price before the completion date on 25 September 2006.

(ii) Whether the sum paid under the SPA was to be treated as rental or as part payment of the purchase price was a matter that required determination at the trial?

(iii) Whether the SPA is a conditional agreement which can only come into force upon the fulfillment of all conditions precedent.

(iv) The issue of encroachment.

[36] Since the defendant did not file any cross-appeal against the High Court's decision, it was rightly submitted that the defendant cannot during the course of this appeal seek to raise any other issue apart from those issues identified by the High Court as triable issues. It must also be mentioned that the defendant did not file an appeal against the decision of the High Court in regard to the plaintiff's application for an *interim* injunction and, consequently, the High Court's findings of fact in that decision cannot now be refuted or challenged by the defendant.

[37] The High Court erred in holding that there were four triable issues. The undisputed facts cannot be categorised as triable issues. Permit me to reiterate the undisputed and incontrovertible facts in order to highlight the errors on the part of the High Court:

(i) it is a fact that the State Authority's approval for the transfer of the said land to the plaintiff was granted on 22 May 2006 and that the approval was valid for a period of six (6) months from the date of the approval until 22 November 2006;

(ii) it is a fact that there were only four (4) conditions precedent in the SPA and based on the documentary evidence all these four (4) conditions precedent have been satisfied;

(iii) it is a fact that after all the four (4) conditions precedent have been satisfied, the SPA became unconditional;

(iv) it is a fact that the plaintiff received a notice from the solicitors of Textile claiming that the defendant had encroached into their client's land;

(v) it is a fact that the defendant was pursuing an amicable resolution with Textile in regard to the encroachment;

(vi) it is a fact that only in October 2007 that the defendant succeeded in resolving the encroachment issue and by that time the State Authority's approval and consent together with the redemption cum undertaking which had been earlier obtained by the defendant had lapsed; and

(vii) it is also a fact that the plaintiff was able to pay the balance of the purchase price within the completion period of the SPA.

[38] All these facts, taken cumulatively, would demolish the perception of the High Court that there were triable issues.

The First Issue

[39] As demonstrated, the lapse of approval of the State Authority is not disputed. And what is not disputed can never constitute a triable issue. In regard to the effect of the lapse of approval of the State Authority on the plaintiff's failure to pay the balance of the purchase price, it is not an issue that requires a trial. It is more in the nature of a question of law. The pertinent question to pose would be as follows: Is the plaintiff contractually and legally obliged to pay the balance of the purchase price to the defendant when the outstanding issue of encroachment with Textile has not been resolved by the defendant thereby putting the said land in a non-deliverable state? These are questions of law and they can be answered without the necessity of a trial. The answers are as follows. The plaintiff is not required to complete the SPA until the defendant is in a position to transfer a good title. In other words, the defendant must have the said land in a deliverable state which must necessarily be free from encumbrance, liability or claims by third parties.

[40] When the defendant expressed its desire to resolve the encroachment issue amicably with Textile, the defendant requested the plaintiff to continue to pay the rent and the defendant agreed that such payment would constitute part payment of the purchase price. The defendant's request clearly demonstrates that the defendant had acknowledged that the plaintiff was under no obligation to pay the balance of the purchase price until the issue of encroachment has been resolved.

[41] In law, the encroachment by the defendant onto Textile's land was a clear breach of the condition of the SPA. As an innocent party, the plaintiff was thus relieved from performing its obligations under the SPA until the defendant had remedied the breach by settling the encroachment issue with Textile. Thus, the failure of the plaintiff to pay the balance of the purchase price before the completion date does not constitute a triable issue. And the High Court had erred when it held otherwise.

The Second Issue

[42] I must reiterate that pending the resolution of the encroachment issue, the defendant requested the plaintiff to continue to pay the rent. The parties agreed that the plaintiff would utilise the sum of RM295,000 paid under the SPA together with the sum of RM191,400 which the defendant held as rental deposit to set off the rent for February 2006 right up to a part of September 2006. The plaintiff also agreed to pay a further sum of RM151,600 as rent for the remaining period of September 2006 to November 2006. Now, both the parties agreed that all these payments would be treated as part payment of the purchase price of the said land as the parties continue to complete the SPA after the resolution of the encroachment issue. This very agreement was recorded in twelve (12) contemporaneous letters which the plaintiff's solicitors had sent to the defendant's solicitors.

[43] The defendant did not refute that all the aforesaid payments formed part payment of the purchase price of the said land as the parties continue with the SPA pending resolution of the encroachment issue by the defendant. The defendant continued to accept payments based on this condition for almost a year. The defendant showed its true colours for the very first time when the plaintiff filed this action in the High Court. It must be emphasised that any denial, objection or challenge advanced by any party ought to be made promptly (see *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2007] 6 CLJ 741, 781, CA, where this court cited with approval the dicta of Lord Esher MR in *Wiedeman v. Walpole* [1891] 2 QB 534 that states as follows: "... if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree"). There was no promptitude on the part of the defendant in challenging that all the aforesaid monetary payments by the plaintiff formed part payment of the purchase price of the said land. The defendant too did not dispute the contents of the twelve (12) contemporaneous letters and that was that the monetary payments would constitute part payment of the purchase price.

[44] The available evidence weighed in favour of the plaintiff. The twelve (12) contemporaneous letters written over a duration of an entire year by the plaintiff's solicitors to the defendant's solicitors unequivocally stated, in no uncertain terms, that the monetary

payments made by the plaintiff pending the resolution of the encroachment issue would be treated as part payment of the purchase price. It must be stressed that the defendant accepted payments of these sums for a whole year without objection and this very condition was repeated twelve (12) times without fail by the plaintiff's solicitors. It is germane to mention that the defendant did not dispute nor challenge nor deny that it had agreed to the condition. The denial by the defendant only surfaced when the plaintiff filed this action in the High Court. By then, it was too late for the defendant to resile.

The Third Issue

[45] In answering this issue, I must highlight the following assertions:

(i) it is not in dispute that the SPA was a conditional agreement and it was subject to the conditions precedent as set out in para "B" of the Second Schedule of the SPA;

(ii) it is a fact that all the conditions precedent have been fulfilled and this is evident from the defendant's own solicitors' letter dated 26 May 2006 wherein they confirmed the completion date to be on 25 August 2006 together with one month's extension to 25 September 2006;

(iii) the documents found at pp. 238 to 249 of "ARJ1" demonstrate that all the conditions precedent have been satisfied; and

(iv) it is a fact that the defendant throughout the course of the proceeding did not dispute that all the conditions precedent had been fulfilled.

[46] The operation of a contract may be subject to a condition precedent. And until the condition precedent occurs the contract is inoperative. A condition precedent may suspend entirely the formation of the contract or it may not delay formation itself but merely the operation of some, or all, of the obligations under the contract. In *John Pym v. Robert James Roy Campbell, James Thompson Mackenzie And Richard Pastor Pritchard* [1856] 6 EI. & BI. 379, for instance, the court held that prior to the fulfilment of the condition there was no contract in existence. In that case, the plaintiff wished to sell to the defendant a share in the invention of the plaintiff. A written document appeared to contain an

agreement for the purchase. The plaintiff sought to rely upon it but the defendant succeeded in establishing that the parties had further agreed that the written document was to be the agreement only if the plaintiff's invention was approved by a third party by the name of Abernethie. Unfortunately, Abernethie had not given his approval of the invention. The court held that there was no contract at all because Abernethie's approval was a condition precedent to the existence of the contract.

[47] The case of *Marks v. Board And Another* [1930] 46 TLR 424 provides another example where no contract was found to exist because of a non-fulfilment of a condition. That was a case where there was a document labelled as a "memorandum of agreement" which had been drawn up in relation to the sale of a house. That document carried the following words "subject to survey". The court held, on the facts, that there was no contract in existence.

[48] Put differently, an agreement subject to a condition precedent may impose some degree of obligation on both the parties or on one of them. And whether it has this effect or otherwise would depend on the degree of obligation that is imposed and it would also depend on the true construction of the term specifying the condition precedent (*Bentworth Finance Ltd. v. Lubert And Another* [1968] 1 QB 680). A few examples of a condition precedent, in that context, will now be shown:

(i) in *Brown and Others v. Knowsley Borough Council* [1986] IRLR 102 (where the appointment is said to "last only as long as sufficient funds were provided" from specified sources);

(ii) in *Gyllenhammar & Partners International Ltd And Others v. Sour Brodogradevna Industrija* [1989] 2 Lloyd's Rep. 403 (where the contract is said to "become null and void" if certain consents were not obtained); and

(iii) in *Jameson and another (executors of Jameson (decd)) v. Central Electricity Generating Board (Babcock Energy Ltd, third party)* [1999] 1 All ER 193, 207 (where settlement of a tort claim become immediately binding but subject to implied resolutive condition that it was to become void if the agreed amount was not paid).

[49] In the context of the present appeal, it is elementary that the completion date only crystallizes upon all the conditions precedent being met. Thus, once all the conditions precedent have been met, the SPA was no longer a conditional agreement. Rather, it was unconditional and had come into force.

[50] Now, the correct conclusions to arrive at on the available documentary evidence would be as follows:

(i) whether the SPA was a conditional contract is not a triable issue; it is a clear and undisputed fact that it was conditional;

(ii) whether the conditions precedent in the SPA were satisfied is also not a triable issue because there are undisputed documents to demonstrate that all the conditions precedent have been fulfilled; and

(iii) whether the SPA had become unconditional or had come into force is also not a triable issue because all the conditions precedent were fulfilled.

[51] It must be recalled that the defendant took more than a year to resolve the encroachment issue. In the intervening period, the State Authority's approval had lapsed and the redemption statement had expired. The cause of all these must be placed on the shoulders, so to speak, of the defendant because it was the defendant who had required for time to resolve the encroachment issue with Textile.

[52] It would be wrong to allow the defendant to capitalise on its own breach of contract. The defendant cannot be allowed to argue that the SPA is conditional and unenforceable because the State Authority's approval had lapsed. And this seems to be the stand adopted by the defendant as evident from the letter emanating from the defendant's solicitors as seen at exh. "P8" of pp. 210 to 211 of "ARJ1".

[53] The learned counsel for the plaintiff submitted that, in the past, the courts from India have granted a decree of specific performance to enforce the performance of a conditional contract and such a decree was ordered conditional on the conditions precedent being fulfilled. The following Indian authorities were then cited to support that proposition:

(i) *Mrs. Chandnee Widya Vati Madden v. Dr. C.L. Katial and Others*, AIR [1964] SC 978;

(ii) *Shah Jitendra Nanalal, Ahmedabad v. Patel Lallubhai Ishverbhai, Ahmedabad and Others*, AIR [1984] Guj. 145;

(iii) *Pasumarti Ramulu v. Nuthi Anantha Ramulu* AIR [1966] AP 70;

(iv) *Sau, Shantabai v. Manakchand Ratanchand Raka*, AIR [1988] Bom. 82;

(v) *Syed Jalal and others v. Targopal Ram Reddy and Others*, AIR [1970] AP 19;

(vi) *Anjali Das v. Bidyut Sarkar*, AIR [1992] Cal. 47;

(vii) *K.M. Jose and others v. D. Anantha Bhat*, AIR [1987] Kant. 173;

(viii) *Mukesh v. Deonarayan and Others*, AIR [1987] MP 85; and

(ix) *Ajit Prashad Jain v. N.K. Widhani and Others*, AIR [1990] Delhi 42.

[54] Likewise our Malaysian courts too have on several occasions ordered specific performance in cases of land transactions where there were conditions precedent to be fulfilled by the vendors. Cases like *Chong Hoong & Anor. v. Wong Yuen Sang* [1976] 1 MLJ 282, HC; *Chin Tai v. Siow Shiow & Ors.* [1971] 1 MLJ 67, FC; and *National Land Finance Co-operative Society Ltd. v. Sharidal Sdn. Bhd.* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282, FC serve as good examples.

The Fourth Issue

[55] It is unclear from the grounds of judgment of the High Court as to why the question of encroachment requires a trial. What is not disputed cannot be said to be a triable issue.

[56] The defendant did not deny setting up the perimeter fencing demarcating the boundary of the said land. What this means is this. That the defendant did not dispute the fact that it had encroached into Textile's land. The High Court had in fact concluded in the injunction application that there was encroachment and that the defendant had agreed to resolve it. That being the case, there is no need for a trial concerning the question of encroachment.

A **Conclusion**

[57] For the reasons adumbrated above, the appeal is allowed with costs. There shall be judgment as per para. 30 of the statement of claim in favour of the plaintiff. In regard to the
B prayer for specific performance of the SPA with an abatement of the balance of the purchase price in respect of the sum of RM2,763,400 to be taken into account as the sum paid by the plaintiff instead of the original sum of RM1,591,000 as stated in paragraph 30.1 of the statement of claim. In the event the State
C Authority's approval is not granted, damages is ordered against the defendant to be assessed. The defendant has to make an application in accordance with paragraph 30.3(a) to (g) of the statement of claim. And prayers (a) and (b) of prayer 30.3 of the statement of claim will be amended to read "within one month"
D instead of "within seven days".

[58] Deposit is to be refunded to the plaintiff. The order of the High Court dated 4 September 2008 is hereby set aside.

KN Segara JCA:

E

[59] This is the appellant's appeal against the decision of the learned High Court judge given on 4 September 2008 dismissing with costs the appellant's application for summary judgment against the respondent under O. 81 of the Rules of the High
F Court 1980 (O. 81 RHC) for specific performance of a sale and purchase agreement dated 8 February 2006.

[60] The only question for determination in this appeal before us is whether the respondent has raised any *bona fide* defence, or the
G respondent has satisfied the court that there is an issue or question in dispute which ought to be tried, or there ought for some other reason to be a trial of the action. It is settled law that an order for summary judgment under O. 81 RHC should only be made in a plain and obvious case and when there is no necessity
H for a trial.

[61] The respondent's defence, in a nut-shell, is that there is no valid agreement to be specifically performed when the said agreement had become unenforceable and void upon the expiry of the State Authority Approval (consent to transfer the land to the
I appellant) on 22 November 2006 and no fresh agreement has thereafter been entered by the parties.

[62] The undisputed facts based on the pleadings, documents exhibits and affidavits of the parties herein at the time of the application for summary judgment are as follows.

[63] The respondent is the registered owner of an industrial land in the Mukim of Pulai identified as HS(D) 181259 PTD 2571 Mukim Pulai, District of Johore Bahru, together with the buildings erected thereon.

[64] The appellant has been the respondent's tenant on the land since 1992. Initially, the appellant occupied only one of the four blocks of factory premises on the said land, namely the last block, while the rest were tenanted by others. Subsequently, the appellant rented the entire land from the respondent. The last tenancy agreement between the parties was dated 1 April 2004 for a term of five (5) years commencing from 1 July 2004, with an option for a further term of three (3) years. The agreed monthly rent under this agreement was RM63,8000. The respondent had at all material times represented expressly or impliedly that the respondent is the owner of all the said land comprised within the boundary set up by the respondent. The respondent's express or implied representation included that all the buildings and structures and access roads or passage way on the said land prior to the tenancy were built within the perimeter of the said land. The respondent had also set up perimeter fencing to demarcate the boundary of the said land.

[65] On 8 February 2006 (during the currency of the tenancy agreement), the appellant and the respondent entered into a Sale and Purchase Agreement (SPA) in respect of the said land. The salient terms and conditions of the SPA provide:

a) That the purchase price of the said land is RM5.9 million.

b) That the sum of RM295,000 shall be paid to the respondent upon execution of the SPA ("the first payment"). The appellant paid the sum.

c) That the sum of RM295,000 shall be paid to the appellant's solicitors as stakeholders ("the second payment") to be kept in an interest-bearing account and utilized in the manner stated in paragraph (B)(4) of the Second Schedule to the SPA. The appellant paid the sum and the Second Payment was kept in an interest bearing fixed account.

A d) That the balance purchase price of RM5.31 million is to be paid within three months from the date of the fulfillment of all conditions precedent stated in the Second Schedule of the SPA.

B **[66]** The conditions precedent stipulated in the Second Schedule to the SPA found in para (B) of the Schedule also provides that the sale and purchase of the said land is conditional on the conditions being met within six months from the date of the SPA ("the Unconditional Period").

C **[67]** The conditions precedent set out in the SPA, among others, are:

i) The appellant's solicitors must receive a letter from the respondent's financier confirming that the redemption sum for
D the said land payable on the latest date stipulated in the letter does not exceed 75% of the purchase.

ii) The appellant's solicitors must receive a letter from the respondent's financier undertaking to release to the
E respondent's solicitors upon receipt of the agreed redemption sum the issue document of title to the said land, the duplicate charge and the discharge of charge thereto duly executed and stamped.

F (The requirements in i) and ii) are jointly called "the Redemption cum Undertaking")

iii) The respondent must obtain the approval and consent of the State Authority of Johor to transfer the said land to the appellant ("the State Authority Approval").

G

iv) The respondent must procure the withdrawal or removal of the caveat Selatan Johor Electrical Engineering Sdn. Bhd. entered on the said land.

H **[68]** On 13 March 2006, the second payment was released to the respondent's solicitors upon confirmation that the caveat Selatan Johor Electrical Engineering Sdn. Bhd. entered on the said land had been removed.

[69] On 26 May 2006, the State Authority Approval dated
I 22 May 2006 was received. The approval was subject to the condition that the instrument of transfer be presented to the Johor

Land Registry within six months from the date of the approval. If the transfer is not presented within the stipulated six months, the approval would lapse. As the final condition precedent was met on 26 May 2006(that is all conditions precedent had been fulfilled), the completion date for the SPA was 25 August 2006, that is three months from the fulfillment of all conditions precedent. The respondent's solicitors confirmed this *via* their letter dated 26 May 2006 in which they expressly stated that the completion date would fall on 25 August 2006 with a one month extension which would expire on 25 September 2006. Thus the appellant had until 25 September 2006 to pay the balance purchase price to the respondent.

[70] However, on 14 June 2006, the appellant received a letter from M/s Sing, Lim & Low, a firm of solicitors representing Textile Corporation (M) Sdn. Bhd. (the company). The company is the legal owner of the land adjoining the respondent's said land. In that letter the company's solicitors alleged the company's land had been encroached. The material parts of the letter reads:

> We are instructed by our client to inform you that they had engaged a licensed land surveyor, … to conduct a survey of the abovementioned land and the result of the survey revealed that the extensions from the neighbouring buildings and structures had encroached illegally onto some portions of our client's abovementioned land. We enclose herewith a copy of the land survey plan with the encroachment coloured in yellow for your perusal.
>
> We are also instructed by our client to inform you that the said illegal extensions onto the portion of the said land were constructed by you without license and consent from our client.
>
> We are further instructed to state and to give you notice that your above actions tantamount to "illegal occupation" of our client's private property. As such we are instructed to demand from you, which we hereby do, that you within THIRTY (30) DAYS FROM THE DATE HEREOF, deliver vacant possession of the portion of the said land illegally occupied by you to our client and restore the said land to its original state and condition without any buildings and structures thereon.
>
> TAKE NOTICE that in the event you fail, neglect and/or refuse to deliver vacant possession of the said land on or before 05-07-2006, our client has instructed that it has no alternative but to proceed with eviction and other proceedings against you without further notice for which you shall be liable for all consequential costs incurred as a result thereof.

[71] The appellant's solicitors alerted the respondent's solicitors concerning the demand from the company. The appellant also contacted the respondent concerning the company's allegation of encroachment and was told by the respondent that it was in the midst of discussions with the company to settle the encroachment issue amicably. The appellant wished the dispute between the company and the respondent to be settled expeditiously in order for the appellant to complete the purchase of the said land by the agreed completion date/s (25 August 2006 or 25 September 2006).

[72] On or about 22 June 2006 the appellant deposited the balance price of RM5.31 million with its solicitors and was ready able and willing to complete the purchase upon resolution of the dispute between the company and the respondent over the encroachment (it must be remembered that the "vendor agreed to sell and the purchaser agreed to purchase the said property free from all … encumbrances …" as agreed in the SPA).

[73] The respondent initially denied responsibility for the encroachment and blamed the appellant for the encroachment. Subsequently, the appellant and the respondent together attempted to resolve the encroachment issue although the appellant maintained at all times that the respondent is solely responsible for the encroachment.

[74] Pending the resolution of the encroachment issue (and since the balance of the purchase price of RM5.31 million had not been tendered to the respondent directly) the respondent requested that the appellant continue to pay the rent under the tenancy agreement notwithstanding that the parties had expressly agreed under the SPA in the Second Schedule at para (C)(2) that the payment of monthly rental will cease with effect from 1 February 2006. It was also an agreed term under the SPA that the appellant would continue to occupy and enjoy vacant possession of the land pending the completion of the SPA. The said para (C)(2) of the Second Schedule reads:

> Notwithstanding the provisions contained in the Tenancy Agreement, the parties agree that the Purchaser will cease to pay the monthly rental with effect from 1 February 2006, but the Purchaser is entitled vacant possession of the said Property. In the event this agreement is terminated the Purchaser shall continue to pay the rental to the Vendor pursuant to the said Tenancy agreement.

[75] The appellant agreed to the respondent's request for the appellant to pay rent pending the resolution of the encroachment issue subject to the condition that the payments made would be treated as part payment of the purchase price of the said land when the parties continue to complete the sale and purchase.

[76] The appellant and the respondent agreed that the appellant would utilize:

(i) The second payment amounting to RM295,000 and

(ii) The rental deposits the respondent held amounting to RM191,400.

to set off the rent for February 2006 through to part September 2006. The appellant agreed to pay and did pay a further sum of RM151,600 being rent for the remaining part of September 2006 through to November 2006.

[77] The appellant's solicitors sent a letter dated 13 November 2006 in which the appellant's solicitors set out the revised calculations of the amount that had been paid at the time by the appellant to the respondent. The revised calculations showed that the appellant had paid to the respondent the sum of RM953,000 which comprised 10% of the purchase price (RM590,000), rental deposit (RM191,400) utility deposit (RM20,000) and the payment of RM151,600 made on 8 November 2006. It was expressly reiterated in this letter that if the parties proceed with the sale and purchase after the resolution of the encroachment issue, the sum of RM953,000 would be treated as part payment of the purchase price of the said land (see exhs. P4 and P5, the appellant's solicitors' letter dated 8 November 2006 and 13 November 2006).

[78] Thereafter, the respondent made further requests for rent and the appellant paid the monthly rent of RM63,800 through its solicitors. A total of ten payments were made representing rent for the months of December 2006 through to September 2007. All payments were made on the express condition that if the parties proceed with the sale and purchase of the said land, the amounts paid would be treated as part payment of the purchase price of the said land. If, however, the SPA was terminated and the parties continue with the tenancy, the amounts paid would be treated as rent (see exh. P6 containing ten letters from the appellant's solicitors to the respondent's solicitors forwarding the

A rent for the months of December 2006 through to September 2007 which were in similar terms as exh. P5 and were never refuted by the respondent).

[79] Although the appellant continued to pay the rent to the B respondent, the appellant was ready able and willing to complete the purchase of the said land but for the supervening encroachment which was solely attributable to the respondent. In law, the encroachment issue gave rise to respondent's breach of an express term in the SPA wherein it had represented that it was C the legal owner of the said land and all the fixtures and buildings thereon. Therefore, in law, the appellant had the option to continue with the purchase or terminate it once the encroachment issue was resolved as the respondent was solely responsible for it.

D **[80]** The encroachment issue was resolved sometime in October 2007. Thereupon, the appellant's solicitors sent to the respondent's solicitors on 19 October 2007 a draft supplemental agreement for their perusal and comments. The draft contained standard terms that were necessary to complete the transaction E which included among others, a term requiring the respondent to make a fresh application for State Authority Approval or a renewal of the approval that had lapsed (see exh. P7 – copy of draft supplemental agreement). About three weeks later, on 7 November 2007, the respondent's solicitors wrote to the appellant's solicitors F to propose that as the State Authority Approval had lapsed:

(a) The SPA be terminated;

(b) A Deed of Revocation be executed;

G (c) A fresh sale and purchase agreement be executed by the parties with the purchase price set at RM5.9 million;

(d) That 10% of the purchase price shall be deemed paid by the appellant;

H (e) That all other payments the appellant had made be treated as rent;

(f) That the appellant continues to pay rent until completion of the new sale and purchase agreement.

I (see exh. P8 – respondent's solicitors' letter dated 7 November 2007)

[81] The aforesaid proposal was clearly not made *bona fide* by the respondent. It was unfair, unjust and inequitable. The respondent was attempting to take undue advantage to enrich itself as a result of the lapse of the State Authority Approval that had come about entirely as a result of the encroachment issue. The circumstances of the case did not warrant the termination of the SPA but merely the execution of a suitably drafted supplemental agreement to give force and effect to the original SPA.

[82] The appellant rejected the respondent's proposal referred to above and insisted that the parties proceed to complete the SPA on agreed terms in particular that all payments made up to that point would be treated as part payment of the purchase price. By a letter dated 21 November 2007 (exh. P9) the appellant through its solicitors reiterated that it is ready willing and able to complete the SPA and insisted that the SPA proceeds subject to the necessary variations set out in the draft supplemental agreement exh. P7 referred earlier. Then, on 10 December 2007, the appellant's solicitors again sent to the respondent's solicitors a draft revised supplemental agreement (see exh. P9) which was substantially similar to the earlier draft supplemental agreement, exh. P7.

[83] The respondent's solicitors responded the following day (11 December 2007) and sent a letter dated 10 December 2007 (exh. P11) to the appellant's solicitors demanding the sum of RM1,467,400 being alleged rent for 23 months from February 2006 to December 2007.

[84] The appellant's solicitors responded to this demand and reiterated that the rent paid up to October 2007 was to be treated as payment of part purchase price as earlier agreed at the respondent's own request. The appellant also insisted that the respondent complete the SPA now that the respondent had resolved the encroachment issue (see exh. P12 – appellant solicitors' letter dated 26 December 2007). The same day (26 December 2007) the appellant's solicitors received a letter from the respondent's solicitors purportedly terminating the SPA on the ground that the appellant had failed to pay the balance purchase price on or before the extended completion date of 25 September 2006 (see exh. P13).

[85] The appellant disputed the termination and instructed its solicitors to file an action in the High Court for specific performance of the SPA and other ancillary orders. The writ of summons was filed on 2 May 2008. Thereafter, the appellant applied for summary judgment pursuant to O. 81 RHC on 8 May 2008 (encl. 9). The respondent filed its defence on 16 May 2008 without any counterclaim against the appellant.

[86] Soon thereafter, the respondent threatened to evict the appellant from the land and issued a notice of demand and notice to quit dated 28 May 2008 alleging that the appellant was in arrears of rent amounting to RM406,800 as at the date of the said notice (see exh. LS3). The appellant promptly filed a summons in chambers dated 11 June 2008 (encl. 19) essentially for an *interim* injunction to restrain the respondent from taking any steps to evict the appellant pending the disposal of the appellant's action for specific performance of the SPA.

[87] The learned judge delivered his decision in respect of both the applications on 4 September 2008.

[88] The learned judge dismissed the appellant's application for summary judgment on the ground there were the following triable issues:

(a) Firstly, there is the issue about the lapse of the approval of the State Authority and its ramifications due to the alleged failure of the appellant to pay the balance of the purchase price, as agreed, on 25 September 2006 or before 22 November 2006;

(b) Secondly, the issue whether the sum paid under the SPA is to be treated as rental or part payment towards the balance of the purchase price;

(c) Thirdly, whether the SPA is a conditional agreement which can only come into force upon fulfillment of all conditions precedent;

(d) Fourthly, the issue of encroachment.

[89] In respect of the second application (the decision of which was made immediately after dismissing the application for summary judgment) the learned judge granted an *interim* injunction to restrain the respondent from evicting the appellant from the said

land and ordered that the sum of RM406,800 (the alleged arrears of rental) was to be paid by the appellant to the respondent's solicitors within 30 days of the order and thereafter the sum of RM63,800 on or before the 7th day of each month to the respondent's solicitors until the final disposal of the action (the first payment being a sum totaling RM255,200 for the months of June, July, August and September 2008). It was further ordered that all sums directed to be paid by the appellant to the respondent pursuant to the order shall be credited by the respondent's solicitors to the account of the respondent's account No 409070004349 and 9072200827620 at Affin Bank Berhad (for servicing the respondent's loan). The respondent did not file any appeal against the order granting the *interim* injunction.

[90] We have perused through the record of appeal very carefully and after considering all the documentary exhibits tendered for the summary judgment and the affidavits in support as well as in opposition we are unanimous that the learned judge had seriously erred and misdirected himself in deciding there are issues for trial.

The First Issue: Lapse Of State Authority Approval

[91] It is not in dispute that the State Authority approval for the transfer of the land to the appellant was granted. The approval in question was granted on 22 May 2006. The approval was valid for a period of six months from the date of approval that is until 22 November 2006. The lapse of the approval is not disputed and therefore cannot constitute a triable issue. The effect of the lapse of the approval on the appellant's failure to pay the balance purchase price does not require a trial. The only question for determination is a question of law that can be summarily determined on the undisputed facts of this case.

[92] Is a purchaser contractually and legally obliged to pay the balance purchase price to a vendor who has not resolved an outstanding encroachment/trespass issue with the owner of an adjacent land and hence not put the land in a deliverable state, free of encumbrance?

[93] A purchaser is not required to complete a sale and purchase transaction until and unless the vendor is able to transfer good title free from encumbrance, liability or claims. If the physical boundary of the land as demarcated by a vendor is erroneous,

that must in law be a breach of a fundamental term of the contract. There is no need for such a term to be expressly stated in the contract (SPA) – the term can be readily implied.

[94] In this case there was a claim for trespass which would be a liability passed to any successor-in-title taking over from the respondent. The respondent's encroachment onto the adjacent land was a clear breach of a condition of the contract. The appellant, consequently, being the innocent party was relieved from having to perform its obligations under the contract until the respondent had remedied that breach. The respondent itself admitted this liability and agreed to resolve it prior to the completion of the SPA. The only request was that the appellant continue to pay rent pending the resolution of the encroachment issue which payments they agreed would constitute part payment of the purchase price. This request clearly demonstrates that the respondent acknowledged that the appellant was under no legal, business/commercial, nor moral obligation to pay the balance purchase price until the issue of trespass was resolved. The appellant's failure to pay the balance price before the completion date therefore does not constitute a triable issue.

Second Issue: Payments Pending Resolution Of Encroachment – Rent Or Part Payment Of Purchase

[95] The documentary evidence – 12 contemporaneous letters written over a period of an entire year by the appellant's solicitors to the respondent's solicitors unequivocally stated that the payments made pending the resolution of the encroachment issue would be treated as part payment of the purchase price. The respondent accepted for a full year on this condition without objection, and this condition was repeated on 12 occasions without fail by the appellant. The respondent never once disputed, challenged or denied that it agreed to this condition. A denial was only made when this action was filed by the appellant.

[96] The learned trial judge had stated in his grounds or made a finding in the *interim* injunction application *inter alia*, "The plaintiff's case that the defendant agreed to resolve the encroachment issue is supported by exh. P4, P5 and P6 (encl. 18). It appears that the encroachment issue was resolved in October 2007 but according to the plaintiff the defendant refused to proceed with the sale. It is also significant to note pending the resolution of this

issue the three contemporaneous documents show that the parties agreed that the plaintiff continued to pay to the defendant rent on the condition that the rent paid during that period would be treated as payment of part of the purchase."

[97] In the above circumstances, the payments made pending the resolution of the encroachment was clearly to account of purchase price – it can be determined summarily on the documentary evidence without a trial.

Third Issue: Whether The SPA Is A Conditional Agreement Which Can Only Come Into Force Upon Fulfillment Of All Conditions Precedent

[98] It is not in dispute that the SPA was a conditional agreement. It was subject to the conditions precedent set out in para B of the Second Schedule of the SPA. It is a fact that all conditions precedent was satisfied. This is evident from the respondent's own solicitors' letter dated 26 May 2006 in which they confirmed the completion date for the transaction fell on 25 August 2006 together with a one month extension to 25 September 2006 – it is elementary that the completion date only crystallizes upon all conditions precedent being met. As such, the SPA was no longer a conditional agreement and had come into force.

[99] Whether the SPA had become unconditional is a question of fact that can be determined by contemporaneous and unchallenged documents that were already before the court. The learned trial judge's conclusion that this was a question that had to be determined at trial is clearly erroneous and inconsistent with the respondent's solicitors' letter confirming the completion date.

Fourth Issue: The Issue of Encroachment

[100] The respondent has not denied the fact that it had set up the perimeter fencing to demarcate the boundary of the said land. It is a fact that the owner of the adjacent land had alleged trespass to its land and that the trespass came to light only during the completion period for the SPA when a demand was made by the solicitors for the adjacent landowner. The contemporaneous letters which the appellant's solicitors wrote confirm that the respondent agreed to resolve the encroachment issue. In the circumstances, there is no fact concerning the encroachment that requires a trial.

[101] We are unanimous that this is a proper case for summary judgment. It is abundantly clear that the issues identified by the learned judge as triable are not issues that require a trial, as the issues in fact involve either undisputed facts or concern questions of law that can be determined summarily. The respondent has not raised any *bona fide* defence to the appellant's claim for specific performance of the SPA.

[102] There shall be judgment for the appellant for specific performance of the SPA by the respondent, with an abatement of the balance purchase price in respect of all sums paid to the respondent as rent from February 2006, together with all ancillary orders deemed necessary for the parties to complete the SPA. In the event the State Authority's approval is not granted, damages is ordered against the defendant to be assessed. The period of "seven days" stipulated in paragraph 30.3 a. and 30.3 b. of the statement of claim shall be substituted with "one month". However, there shall be no ancillary order in terms of paragraph 30.3 c. namely, "That in the event State Authority Approval is not obtained within six months, the SPA will be deemed terminated and the defendant shall return to the plaintiff within seven days the sum of RM59,000."

[103] The appeal is allowed with costs here and below. Deposit refunded to appellant. The order of the High Court dated 4 September 2008 is set aside.